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No. 90-989

# In The

# Supreme Court Of The United States

OCTOBER TERM, 1990

**CALDOR, INC.,**
*Petitioner,*

v.

**MARY M. HESLIN, COMMISSIONER OF CONSUMER PROTECTION, ET AL.,**
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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## QUESTION PRESENTED

Whether the decision below is inconsistent with this Court's decision in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, ____ U.S. ____, 110 S. Ct. 2281 (1990)?

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## STATEMENT OF THE CASE

The Connecticut Unfair Trade Practices Act ("CUTPA") prohibits the use of unfair or deceptive acts or practices in the conduct of trade or commerce. Conn. Gen. Stat. § 42-110b(a).[1] The legislature delegated to the respondent, the Commissioner of Consumer Protection, authority to establish

[1] "[Conn. Gen. Stat.] Sec. 42-110b. Unfair trade practices prohibited. Legislative intent. (a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

by regulation those acts, practices or methods which shall be deemed to be unfair or deceptive in violation of CUTPA. Conn. Gen. Stat. § 42-110b(c).[2] The Commissioner, acting pursuant to this authority, promulgated the challenged regulation, which establishes as unfair or deceptive certain acts or practices in the advertising of manufacturer's rebates. *Caldor v. Heslin*, 215 Conn. 590, 591-92 (1990) (Pet. App. 2a, 3a).

Manufacturers' rebate programs have been the source of consumer complaints to the Department of Consumer Protection since the early 1980's. In response to these complaints, the Commissioner conducted an investigation of these rebate programs (T. 2-23-89 p. 23); *Caldor v. Heslin*, 215 Conn. at 597 (Pet. App. 7a). In 1988, the Department proposed to adopt a regulation regarding net price advertising (T. 2-23-89 pp. 29-31). Subsequent to a public hearing (Defendant's Exhibit 3), the Commissioner of Consumer Protection adopted 9 Reg. Conn. Agencies, DCP § 42-110b-19(e) (1988) (Defendant's Exhibit 1); *Caldor v. Heslin*, 215 Conn. at 592 (Pet. App. 3a), which became effective December 7, 1988 and provides:

> It shall be an unfair or deceptive act or practice to:
>
> (e) Advertise the availability of a manufacturer's rebate by displaying the net price of the advertised item in the advertisement, unless the amount of the manufacturer's rebate is provided to the consumer by the retailer at the time of purchase of the advertised item. A retailer will not be required to provide the purchaser of an advertised item with the amount of the manufacturer's rebate if the retailer advertises that a manufacturer's rebate is available without

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[2] "[Conn. Gen. Stat. § 42-110b(c)] The Commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act."

> stating the net price of the item. For the purpose of this subsection, "net price" means the ultimate price paid by a consumer after he redeems the manufacturer's rebate offered for the advertised item.

This regulation requires those retailers who choose to use net price advertising to make the rebate available at the time of purchase. The regulation does not apply to or restrict advertising of rebate availability, the amount of the rebate available, that a product is on sale, and the price of the product (T. 1-24-89 p. 105); 9 Reg. Conn. Agencies, DCP § 42-110b-19(e).

## TRIAL COURT PROCEEDINGS

The petitioner brought an action in the Connecticut Superior Court seeking a permanent injunction restraining the respondent from enforcing this regulation against the petitioner. The petitioner claimed that the Commissioner exceeded her statutory authority in adopting the regulation, and that the regulation violated substantive due process and the First Amendment. *Caldor v. Heslin*, 215 Conn. at 592–93 (Pet. Brief 3).

The record of the administrative proceedings leading to adoption of the regulation was admitted at trial (Defendant's Exhibit 3). Examples of the petitioner's net price advertising (Plaintiff's Exhibit 1), a competing retailer's net price advertising (Plaintiff's Exhibit 2), testimony regarding the petitioner's advertising and use of manufacturers' rebates as a marketing technique, and the industry-wide operation of manufacturers' rebate programs (T. 1-24-89) was admitted into evidence. Testimony by the respondent's designee regarding the Commissioner's adoption of the regulation was presented (T. 2-23-89).

This evidence demonstrated that a rebate program is a marketing technique which purports to return a portion of the purchase price to the consumer after purchase. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 3a). To obtain the rebate,

the consumer must obtain, complete and deliver to a designated address, at his own expense, a rebate certificate, the original cash register receipt and a valid proof of purchase. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 4a). Consumers must invariably incur the cost of obtaining the rebate, which at a minimum includes the cost of mailing, *Caldor v. Heslin*. 215 Conn. at 594 (Pet. App. 4a), but often includes other expenses.

Additional barriers to obtaining the rebate exist. A consumer may be required to return the item being replaced, such as a shower head, where the cost of mailing equalled the amount of rebate offered (T. 2-23-89 p. 26). Some consumers were required to cut cans a certain way or to soak bottles in water for three days in order to remove the proof of purchase labels (T. 2-23-89 p. 26). A consumer who purchases a plastic bottle of motor oil is required to destroy the container by cutting open the bottle to obtain the proof of purchase (T. 1-24-89 pp. 109–110). Many rebate promotions limit the amount or number of rebates available to a consumer (T. 1-24-89 pp. 23, 68), and impose a time limitation within which all redemption requirements must be met (T. 1-24-89 p. 110). This time period limitation can leave the consumer with the option of using the product within this time period or transferring the product to another container so that the proof of purchase may be cut out of the container, or "you have the option not to take advantage of the [rebate] offer." (T. 1-24-89 p. 111).

Prominently advertising a product's net price after subtracting the rebate allowance is important to the retailer as a marketing technique. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 4a, 18a). Net price advertising "grabs" the consumers' attention quickly. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 4a, 18a).

A low percentage of redemptions is an essential factor in a manufacturer's rebate program. (Pet. App. 17a). The redemption rate for 5200 rebate promotions in 1988 was forty

percent (T. 1-24-89 pp. 145, 151). The highest redemption rate has been eighty-five percent for a $12.00 rebate, (Pet. App. 17a), and this rate is "almost unheard of." (T. 1-24-89 p. 15). For a $1.00 rebate, the redemption rate was ten to fifteen percent (T. 1-24-89 p. 14). Manufacturers assume a redemption rate of less than one hundred percent (T. 1-24-89 p. 14). If too many consumers redeem the rebates, then rebates lose their effectiveness as a marketing tool (T. 2-23-89 p. 51); (T. 1-24-89 pp. 44, 50).

The trial court found that consumers necessarily incur costs in obtaining the rebate from the manufacturer. *Caldor v. Heslin*, 215 Conn. at 594 (Pet. App. 4a). The advertised net price does not reflect these costs to the consumer (T. 1-24-89 p. 46). The trial court found that the petitioner's net price advertising is "factually untrue" and deceptive as a matter of law. (Pet. App. 19a). The trial court held that the regulation is consistent with the statutory authority granted to the Commissioner and is not arbitrary and capricious. (Pet. App. 20a). The trial court held that the petitioner's net price advertising is deceptive advertising and not protected commercial speech. (Pet. App. 20a). Judgment entered for the respondents.

## APPELLATE PROCEEDINGS

On appeal, the petitioner raised three claims. First, it challenged the trial court's sustaining the regulation upon a finding that the petitioner's net price advertising is factually untrue and deceptive as a matter of law. Secondly, the petitioner claimed that the trial court mistakenly determined that its net price advertising is not subject to protections afforded commercial speech. Finally, the petitioner claimed error in some of the trial court's evidentiary rulings. *Caldor v. Heslin*, 215 Conn. at 594-95 (Pet. App. 5a).

The Connecticut Supreme Court determined that the petitioner's net price advertising is deceptive and, therefore,

the respondent did not exceed her statutory authority by regulating this advertising. *Caldor v. Heslin*, 590 Conn. at 599 (Pet. App. 9a). The Connecticut Supreme Court held that net price advertising is inherently misleading and, as such, does not qualify for constitutional protection afforded commercial speech. *Caldor v. Heslin*, 215 Conn. at 600 (Pet. App. 11a). Finally, the Connecticut Supreme Court upheld the trial court's exclusion of certain evidence. *Caldor v. Heslin*, 215 Conn. at 601-02 (Pet. App. 11a-12a).

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

#### A. The Decision Below Is Not Inconsistent With This Court's Decision In *Peel v. Attorney Registration and Disciplinary Commission of Illinois.*

The petitioner claims that the Connecticut Supreme Court's review of the petitioner's advertising was inadequate under *Peel v. Attorney Registration and Disciplinary Commission of Illinois,* ____ U.S. ____, 110 S. Ct. 2281 (1990). In *Peel,* this Court reversed the Illinois Supreme Court's ruling that the lawyer advertising in issue was not entitled to First Amendment protections. This Court did not consider the constitutional adequacy of the manner in which the Illinois court reviewed this advertising. For several reasons, *Peel* provides no support for the petitioner's claim that the Connecticut Supreme Court's review of its advertising was constitutionally inadequate.

*Peel* came to this Court with a radically different procedural history than this case came to the Connecticut Supreme Court. *Peel* did not involve review of an administrative agency's or lower court's findings of deception. Neither the Illinois Commission, nor any trial court, nor the Illinois Supreme Court made any findings that the advertising in issue was deceptive. 110 S. Ct. at 2288. It was undisputed that the facts stated in the advertising were true and verifiable. 110 S. Ct. at 2288. Illinois justified its absolute ban[3]

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[3] The Connecticut regulation does not prohibit net price advertising entirely, but rather regulates the area "more narrowly." *Caldor v. Heslin,* 215 Conn. at 599 (Pet. App. 10a). The issue in *Peel* was whether Illinois could "categorically prohibit" the lawyer advertising in issue. 110 S. Ct. at 2287. The majority of this Court rejected Illinois' absolute ban on this

*(continued)*

on this truthful advertising by claiming that this advertising was "potentially misleading." This Court undertook a review of whether the advertising was potentially misleading. This Court did not review any agency's or lower court's findings that the advertising was actually or inherently misleading.

Unlike *Peel*, where no prior determination of deception had been made, in this case, "[t]he ultimate conclusion reached by the named defendant and affirmed by the trial court was that net price advertising of a product for which a manufacturer's rebate is offered misleads the consumer about the price the consumer will pay for that product." *Caldor v. Heslin*, 215 Conn. at 597 (Pet. App. 7a). The Connecticut Supreme Court was called upon to review this conclusion on appeal.

In contradistinction to *Peel*, in this case the petitioner claimed that the respondent had exceeded her statutory authority in adopting the regulation because the regulated advertising is not unfair or deceptive.[4] In reviewing this nonconstitutional challenge to the regulation, the Connecticut Supreme Court properly applied the standard for reviewing administrative agency action, which requires the court to determine whether, in light of the evidence, the agency acted unreasonably, arbitrarily, illegally, or in abuse of discretion. *Caldor v. Heslin*, 215 Conn. at 596 (Pet. App. 7a).

In upholding the respondent's determination that net price advertising is deceptive and, therefore, properly regulated by the Commissioner of Consumer Protection under

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[3] *(continued)*
advertising. Two members of the majority would have allowed Illinois to enact regulations, other than a total ban, "to ensure that the public is not misled by such representations." 110 S. Ct. at 2293 (Marshall, J., concurring).

[4] The trial court's finding that the petitioner's net price advertising is deceptive as a matter of law "served as the basis" for the court's conclusion that, in promulgating the regulation, the respondent acted within her statutory authority. *Caldor v. Heslin*, 215 Conn. at 595 (Pet. App. 5a).

CUTPA, both the trial court and the Connecticut Supreme Court engaged in a constitutionally adequate review of the petitioner's advertising under the First Amendment.

Evidence presented in the trial court included the record of the agency proceedings, the petitioner's advertising, a competitor's advertising, testimony regarding the petitioner's advertising and use of manufacturers' rebates as a marketing tool, testimony regarding the industry-wide operation of these rebate programs, and testimony by the respondent's designee regarding the Commissioner's adoption of the regulation.

In its decision, the Connecticut Supreme Court specifically noted the trial court's finding that the petitioner's net price advertising is "factually untrue," 215 Conn. at 594 (Pet. App. 4a), and considered other trial court findings which "detailed the relevant findings made during [the Commissioner's] investigation." 215 Conn. at 597 (Pet. App. 7a). The Connecticut Supreme Court did not overturn these findings, which were challenged on appeal by the petitioner. These findings were the basis for the "ultimate conclusion" reached by the Commissioner, and affirmed by the trial court, that net price advertising "misleads the consumer about the price the consumer will pay for the product." 215 Conn. at 597 (Pet. App. 7a). After reciting the legal standard for evaluating whether advertising is deceptive, 215 Conn. at 597 (Pet. App. 7a–8a), the Connecticut Supreme Court concluded "that *in light of the evidence*, the regulation is consistent with the general statutory scheme that it is designed to implement." 215 Conn. at 597 (Pet. App. 8a) (emphasis added).

Thus, the petitioner's statement that the Connecticut Supreme Court "did not perform any independent analysis as to whether the advertising was misleading" (Pet. Brief at 6) is simply not true. *Peel* does not preclude state appellate courts from properly exercising First Amendment review of an administrative agency's and trial court's determinations of deception, while applying accepted standards for judicial review of agency regulations. Federal courts have followed

this approach in reviewing Federal Trade Commission regulation of deceptive practices. *See, e.g., Harry and Bryant Co. v. FTC,* 726 F.2d 993 (4th Cir.), *cert. denied,* 469 U.S. 820, 105 S. Ct. 91 (1984) (Rejecting challenge to regulations based upon claimed insufficiency of evidence in the administrative record and violation of commercial speech protections). The petitioner's writ presents no novel or significant issues in this regard.

Furthermore, the petitioner's reliance on *Peel* for its claim that the Connecticut Supreme Court's decision "will create radical disparities in First Amendment protections from State to State" (Pet. Brief 12-13) is misplaced. While Illinois had ruled that the advertising in issue was not protected, other states had ruled to the contrary. 110 S. Ct. at 2291 n. 16. Here, the petitioner argues that "there is no past experience, evidence, or precedent, nor any other state with a similar regulation." (Pet. Brief at 8). Thus, the question presented by the petitioner is not of nationwide importance. The petitioner makes no attempt to establish a conflict among courts in ruling on whether regulation of net price advertising similar to Connecticut's is constitutional.

### B. The Connecticut Supreme Court Correctly Held That The Petitioner's Net Price Advertising Is Not Entitled To First Amendment Protections.

It is well recognized that the states and the federal government may restrict or prevent the dissemination of commercial speech that is false, deceptive or misleading. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 638, 105 S. Ct. 2265, 2275 (1985); *Friedman v. Rogers,* 440 U.S. 1, 9, 99 S. Ct. 887, 894 (1979). Untruthful speech, commercial or otherwise, has never been protected. *Friedman v. Rogers,* 440 U.S. at 9, 99 S. Ct. at 894; *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340, 94 S. Ct. 2997, 3007 (1974); *Konigsberg v. State Bar,* 366 U.S. 36, 49 n. 10, 81 S. Ct. 997, 1006 n. 10 (1961). "The government may ban forms of communication more

likely to deceive the public than to inform it." *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 563, 100 S. Ct. 2343, 2350 (1980) (citations omitted).

As discussed above, the Connecticut Supreme Court properly sustained the trial court's findings that the petitioner's net price advertising is both "factually untrue" and "deceptive under the FTC standards." Because it is misleading, this advertising enjoys no First Amendment protection. *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 1002 (4th Cir.), *cert. denied*, 469 U.S. 820, 105 S. Ct. 91 (1984) (FTC regulation of funeral sales practices).

In ruling that deceptive commercial speech enjoys no First Amendment protection, the Connecticut Supreme Court followed an unbroken line of authority. *E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 1830 (1976) ("obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state dealing effectively with this problem."); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 105 S. Ct. 2265, 2275 (1985) ("The State and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . ."); *In Re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 937 (1982) ("misleading advertising may be prohibited entirely").

## II. THE PETITIONER'S ARGUMENT IS WITHOUT MERIT, REGARDLESS OF THE APPROACH USED IN THE DECISION BELOW.

Even if some retailer's net price advertising is entitled to First Amendment protections, the decision below upholding the respondent's regulation is correct.

### A. The Petitioner Cannot Successfully Attack The Regulation As Being Overbroad.

The petitioner complains that the regulation is overbroad, because a retailer publishing a hypothetical advertisement making "every conceivable disclosure associated with rebates" would be subject to the regulation (Pet. Brief 8). Notwithstanding any such hypothetical disclosures, the prominently displayed net price is *not* the true ultimate price the consumer has paid for the product after obtaining the rebate. The First Amendment does not require states "to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." *Friedman v. Rogers*, 440 U.S. 1, 12 n. 11, 99 S. Ct. 887, 895 n. 11 (1979).

Nevertheless, the petitioner's claim that the regulation is overbroad is unavailing. The overbreadth analysis does not apply to commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-81, 97 S. Ct. 2691, 2707-08 (1977); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 n. 20, 98 S. Ct. 1912, 1922 n. 20 (1978). *See also Board of Trustees of State University of New York v. Fox*, ____ U.S. ____, 109 S. Ct. 3028, 3036-37 (1989).

Moreover, the petitioner waived any right it may have had to challenge the regulation as being overbroad. The original complaint included a claim for a declaratory judgment of facial unconstitutionality. The petitioner subsequently amended its pleadings and abandoned this claim (T. 1-25-89 p. 2); (R. 5-7). It proceeded to trial only on the claim that the regulation is unconstitutional as applied to its advertising, seeking injunctive relief solely in favor of the petitioner. No evidence of any advertisement making the petitioner's hypothetical disclosures was introduced at trial or in the administrative proceedings. The petitioner's advertisements offered at trial did not provide such disclosure. The petitioner's advertisements are "deceptive as a matter of law." *Caldor v. Heslin*, 215 Conn. at 595 (Pet. App. 5a).

### B. The Regulation Reasonably Advances A Substantial State Interest.

The petitioner argues that the regulation bears no reasonable relation to the governmental interest the regulation was designed to address (Pet. Brief 11). In order to advance this argument, the petitioner mischaracterizes the state's interest to be controlling burdensome rebate redemption conditions imposed by manufacturers upon consumers (Pet. Brief 9). However, the Commissioner's designee testified at trial that the state's goal is to address *deceptive advertising* (T. 2-23-89 p. 30).

Net price advertising is deceptive because it misrepresents that the advertised net price is the true ultimate price the consumer will have paid for a product after obtaining the rebate, and fails to disclose costs and expenses the consumer must pay to obtain a rebate, and limitations on rebate availability. Retailers who use net price advertising offer a product at a price which consumers do not pay for the product. Most purchasing consumers never obtain the rebate; those who do pay more than the advertised net price.

Protecting consumers from misleading or deceptive advertising is a substantial state interest. *Friedman v. Rogers,* 440 U.S. 1, 15, 99 S. Ct. 887, 897 (1979). By requiring those retailers who choose to use net price advertising to make the rebate available at the time of purchase, the regulation ensures that the true ultimate price consumers will have paid after obtaining the rebate is the advertised net price. The regulation directly advances the state's interest in protecting consumers from this type of deceptive advertising.

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has

> no reasonable relation to the unlawful practices found to exist.

*Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13, 66 S. Ct. 758, 760-61 (1946).

Contrary to the plaintiff's assertions (Pet. Brief 10), the regulation does not "prevent retailers from providing consumers with important price information." The regulation does not apply to or restrict advertising of rebate availability, the amount of the rebate available, that a product is on sale, and the price of the product (T. 1-24-89 p. 105); 9 Reg. Conn. Agencies, DCP § 42-110b-19(e). Relevant, truthful information is not affected. Only the deceptive component of the petitioner's advertising, the net price, is regulated. In tailoring the regulation chosen to accomplish the state's purposes, this Court does not require the least restrictive means. The Court "leave[s] it to governmental decisionmakers to judge what manner of regulation may be employed." *Board of Trustees of the State University of New York v. Fox*, ____ U.S. ____, 109 S. Ct. 3028, 3035 (1989).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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